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ABSTRACT

Since 1939, legal recognition of the public forum concept has been gradually extended to include the public schools. This expansion of the free speech right has been accompanied by a movement of similar intensity aimed at narrowing the scope of regulatory action that might inhibit First Amendment freedoms. Ultimately, recognition of the public school as a public forum was coupled with the narrowed scope of allowable regulatory action. The result has been a philosophical revolution in which the student press, once conceived as an educational tool fully controlled by school authorities, is now seen as enjoying the same freedom from regulation afforded any other speech activity in a public forum. While this philosophy has not been universally accepted as yet, it has been recognized by all levels of federal courts and several state courts. The implication of these developments is that students who edit, produce, or distribute literature on school grounds are subject to regulatory action that is consistent with First Amendment public forum policy as defined by time, place, and manner of distribution restrictions. Additionally, material shown to have caused substantial interference with educational processes is not protected. Censorship based on content alone, however, is no longer seen as being compatible with the functions of the student press. (Author/FL)

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Secondary Education Division

PUBLIC FORUM THEORY IN THE EDUCATIONAL SETTING: FROM THE SCHOOLHOUSE GATE TO THE STUDENT PRESS

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PUBLIC FORUM THEORY IN THE EDUCATIONAL SETTING:
FROM THE SCHOOLHOUSE GATE TO THE STUDENT PRESS

Nearly forty years ago, the Supreme Court decided the case of Hague v. CIO,[1] allowing a labor organization the right to hold organizational meetings in public buildings and parks, and reaffirming the historical belief that the public has a right to use "public places" for the purposes of speech and assembly. Since that decision, the scope of regulations limiting such use has been narrowly defined.[2] To date, the Court has provided three basic guidelines for the regulation of free speech activities in public places: 1) regulation may be considered only when the manner of expression is basically incompatible with the normal activity of a particular place at a particular time,[3] 2) if regulation is instituted, only time, place and manner restrictions may be enforced,[4] 3) if time, place and manner restrictions are enforced, they must provide for fair accommodation of persons desiring the use of the given place.[5]

Concomitant with the development of these regulatory guidelines, the scope of the term "public place" itself has undergone important changes. For instance, in Brown v. Louisiana[6] "public place" was extended to include publicly owned property which had not been traditionally dedicated, as had streets and parks, to the exercise of first amendment rights. There, the Court set aside the convictions of five Blacks who had peacefully protested a regional public library's segregation policy by merely standing and sitting in the library. This decision clearly expanded the public forum right, i.e., having

first amendment protection to express a point of view in a public place intended, at least in part, for that purpose. However, the degree of expansion was still in question.[7]

By 1969, one author observed, "It would seem clear that the public forum right extends to streets and parks, subways, mass transportation terminals, mass entertainment areas, school buildings and grounds, and grounds of general governmental buildings."[8] In that year, the Court dramatically broadened the scope of public forum discussions and left no doubt that public schools were included. In Tinker v. Des Moines Independent Community School District,[9] a landmark ruling concerning students' free speech rights, elementary and high school students had been suspended for wearing black armbands to school as a protest against United States policy in Vietnam. The Court observed that students and teachers to not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[10] The Court stated that students may exercise these rights as long as such expression does not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school (or collide) with the rights of others."[11]

In public high schools and colleges, then, if students may freely exercise their first amendment freedom of expression, and if schools have been identified as public places, can student publications, which are important conduits of student expression, be brought under the umbrella of these protections? That is, can the public forum approach be applied to student publications in public schools, thus giving students protection against administrative censorship similar to that enjoyed by a speaker in a public park?

That protection is not now widespread. Leaflets, magazines, newspapers and other student-published and student-distributed materials circulated on public school grounds have frequently met with considerable opposition from administrators. Whether or not the publications have been products of school-sponsored classes or activities, and whether or not the publications were initiated at the high school or college level, opposition has generally occurred when members of the student press exceeded any of the numerous written and unwritten guidelines which school officials believed to be the limits of acceptability. Most such cases have involved the applicability of the first amendment to student publications.

Based on the Tinker decision, state and lower federal courts have attempted to clarify the first amendment rights of students. In doing so, many have supported the concept of the educational public forum and the idea that students have a right to freedom of expression which operates within the boundaries of the educational situation. Coupled with the holdings of Brown and Tinker, numerous decisions of the lower courts provide support for the conclusions that the public forum concept is applicable to the public school situation, and that the student press enjoys the full protection of the first amendment.

As noted, the process leading to these considerations has been evolutionary in nature. One part of this process was the recognition of public schools as public places, another was the eventual recognition of public schools as public forums and a third was the weakening of the notion that students lost their constitutional rights when entering school. In order to fully appreciate how public forum theory might be applied to student publications, it is helpful to examine each of these points.

Public Schools as Public Places

Together with publicly owned streets and parks, schools have long enjoyed the status of "public place" in this nation's history. Town meetings and other community assemblies have traditionally been held in the schoolhouse, and as first amendment scholar Thomas I. Emerson has noted, "(T)he practice of making available public schools . . . to various groups for meetings or other activities is widespread, both by statute and by custom."[12] The legal status of schools as public places dates back to nineteenth century court rulings that the legal requirement to post public notices in public places was satisfied when the notices were posted at a schoolhouse.[13] More recently, courts have held that public school buildings are by their very nature public buildings[14] and have stressed that university campuses are public places which may be used for purposes of assembly, communicating thoughts between citizens and discussing public questions.[15]

Beyond the recognition of school buildings and grounds as public places, the Supreme Court has recognized that persons enjoy constitutional rights on or near school premises. For example, the Court in Tinker affirmed the essence of a district court's earlier opinion that school "is a public place and its dedication to specific uses does not imply that constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property."[16] This affirmation of the value of personal intercommunication among students has helped to establish a perception of school as something more than a place where persons are sequestered to become involved solely in structured learning situations.

In Healy v. James,[17] a case involving official university recognition of an unchartered student group, the Court recognized that the rights of

association were as valid on campus as they were in the community. The issue arose when the college president denied official recognition to the local chapter of Students for a Democratic Society because he found the group's philosophy antithetical to the school's policies. Denial of recognition included not allowing the group to use the campus bulletin board and the school newspaper. Observing that such denial infringed upon the group's associational rights, the Court placed on the college a heavy burden of proof that the organization would indeed disrupt the campus. The Court's recognition of the value of communication within and among student groups enhanced the perception of schools as public places.

In another case decided that same year, 1972, the Court ruled that citizens exercising their First Amendment rights to free expression near school property enjoyed equal protection under the law. In Police Department v. Mosley,[18] a Chicago city ordinance discriminated between labor picketing and other types of picketing which might occur within 150 feet of primary and secondary school buildings in the city. The Court could find no appropriate governmental interest which was suitably furthered by the ordinance's differential treatment, and thus the anti-discrimination picketing which had occurred outside of a high school was deemed to be constitutionally protected. This decision affirmed that public schools are not subject to special protective actions which might diminish their usefulness as public forums.

A year later, in Papish v. Board of Curators of the University of Missouri,[19] the Court strengthened student press rights and promoted the view that schools are not private enclaves which may easily be differentiated from other public places. The case concerned a graduate student who was suspended

for her on-campus distribution of newspapers featuring language and drawings which, according to university administrators, violated certain "conventions of decency." The Court overturned the student's suspension because "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech."[20] Specifically, this holding meant that the distribution of student newspapers at state institutions was subject to the same first amendment protections afforded the distribution of papers in other public places.

Most recently, the Court applied to the high school situation the procedural safeguards guaranteed to citizens by the due process clause of the fourteenth amendment. In Goss v. Lopez,[21] students had joined a class action suit which challenged an Ohio statute allowing suspension by school authorities for up to ten days without notice or hearing. In finding for the students, the Court considered the "property" and "liberty" interests which were affected by suspension, and confirmed once again that the school situation was not one in which citizens could be excluded from constitutional protections they would normally receive in other situations.

In a span of six years, then, the Supreme Court took great strides in extending constitutional protections to students and others in their dealings with school authorities or in their contacts with school-controlled property. These decisions have brought public schools into focus as being the public places which they actually are.

Public Schools as Public Forums

The conclusion that public schools are public places wherein persons possess constitutional rights necessarily leads to the question of whether or

not schools are also public forums. Soon after the Tinker decision was announced, legal scholars began speculating about the status of public schools as public forums.[22] At minimum, the consensus is that school property may be thought of as a public forum for its student body, that the school may choose to extend the forum privilege to nonstudents and that the school may elect to establish additional forums for its students (such as allowing use of the public address system for extra-curricular announcements or by funding a student newspaper). However, in all instances, school authorities may regulate these forums only in accordance with constitutional principles.

In one sense, the characterization of schools as public forums is tied to an earlier notion about the basic function of schools in general. Over the course of three decades, the Supreme Court repeatedly recognized that schools are the training grounds of tomorrow's citizens, and as such should guarantee constitutional freedoms in the educational community and encourage the free exchange of ideas. In 1943, for example, the Court in West Virginia State Board of Education v. Barnette, referring to the role of boards of education, stated, "That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[23] Applying the same philosophy to universities in 1957, the Court in Sweezy v. New Hampshire noted, "The essentiality of freedom in the community of American universities is almost self-evident. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[24] This sentiment was reiterated by the Court ten years later in Keyishian v. Board of Regents.[25]

In the 1970s, courts have recognized that the intelligent involvement of adults in society finds its roots in the nation's educational system. During this decade, courts in four federal circuits have noted the importance of free speech activities in the development of responsible citizens.[26] Importantly, in each of these circuits, courts have recognized this function at the high school level.

Additionally, the courts in eight circuits have spoken specifically in support of the "school as a public forum" concept.[27] Courts in the Eighth and Ninth Circuits have applied this approach to the secondary school level;[28] in the Fifth, Seventh and Tenth Circuits, courts have discussed these concepts in relation to college situations;[29] and in the First, Second and Fourth Circuits, courts have spoken in such terms at both high school and college levels.[30]

In another sense, the application of public forum theory to schools finds support in the popular portrayal of the academic community as the vanguard of intellectual thought, charged with formulating and developing new or different ideas. Several lower courts, in keeping with this belief, have defended free speech activities in or near schools on the grounds that it is not a judicial function to distinguish among issues or to select for constitutional protection only those issues felt to be of sufficient social importance or those which do not offend the sensibilities of the community at large.[31] At the Supreme Court level, an identical belief was voiced in Papish. There the Court affirmed that "the mere dissemination of ideas--no matter how offensive to good taste--on a state university campus may not be shut off in the name alone of 'conventions of decency.'"[32]

A more general rationale supporting the philosophy that public schools should be considered public forums comes from two cases involving college newspapers. In Antonelli v. Hammond,[33] a college president demanded review of all newspaper material on the ground that the paper's editor had attempted to publish an "obscene" article. The district court recognized that the wide range of intellectual experiences to which students are exposed in the university setting "creates a relatively mature marketplace for the interchange of ideas so that the free speech clause of the First Amendment with its underlying assumption that there is positive social value in an open forum seems particularly appropriate."[34] Three years later, in a case involving a college newspaper's attack on the Catholic Church, a New York court applied the public forum rationale to student newspapers in particular. The court concluded, "The newspaper provides an opportunity for the exchange of intellectual ideas. . . . It serves as a neutral forum for debate of social and local issues of campus concern."[35] Schools and school newspapers, then, are natural forums for the exchange of ideas.

Judicial proclamations that the value of schools lies in the training of future citizens, that the academic community is especially suited to the development of social thought and that schools are a natural forum for the exchange of ideas, have combined to suggest that public schools have been accepted as public forums for many years. The primary reason that this doctrine has not found universal acceptance in our society is that distinctions have been made between student communities and communities in general. These distinctions have led to the application, by administrators and judges, of a dual constitutional standard. The less liberal of these two standards has been

applied to students. Recent years, however, have seen a rapid decline of this dual standard as a valid application of constitutional law.

The Fall of the Double Standard

UCLA law professor Leon Letwin recently dealt at length with the arguments traditionally cited in support of less stringent consitutional standards for the educational community.[36] In answering the arguments, he separated them according to their origins: those based on theories of childhood and those based on theories of education. According to the childhood theories, 1) children are incompetent and in need of paternalistic guidance, 2) there is a "unity of interest" between school authorities and students in which the former can and do protect the interests of the latter and 3) the young have not earned certain rights. The educational theories stated that, 1) student obedience to administrative authority is an educational imperative, 2) student rights are not compatible with school disciplinary requirements, and 3) student complaints serve only as educational diversions.

The educational theories, in one form or another, have often been cited by courts deciding first and fourteenth amendment issues which have arisen in the educational community. However, in spite of this continuing tradition, the concept of free speech in secondary schools and on college campuses has been noticeably strengthened by recent judicial rulings. With increasing frequency, the Supreme Court and lower federal courts have proceeded to apply to the public school environment those standards of constitutional law which have been applied to similar situations occurring in society at large.[37] For example, in the last two decades the Supreme Court has followed this procedure on at least seven occasions. During the same period of time, ten

of the eleven federal circuits and district courts in all but the Third and Eleventh Circuits have also followed this pattern.[38]

Of the analogies stressing the equality of school and community environments, perhaps the most important have been those in which the boundaries of free speech regulation have been defined. One such boundary concerns the point at which authorities may interfere with free speech activity; the boundary is governed by the doctrine of "clear and present danger."[39] In essence, the Supreme Court has held that when free speech activity creates a clear and present danger that will bring about substantive evils which a legislative body has a right to prevent, government may interfere with such activity. The idea of "substantive evils" has more recently been characterized as "imminent lawless action" when applied to society in general.[40] When applied to the school environment, it is referred to as "material and substantial disruption."[41]

In establishing the roots of this analogy, the Court in Tinker drew heavily from two opinions of the Court of Appeals for the Fifth Circuit. The opinions carefully defined the "material and substantial disruption" standard and applied it in two nearly identical situations. In one case, the Fifth Circuit ruled in favor of intervention on the part of school authorities;[42] in the second case, the opposite conclusion was reached.[43] The important element in each case was the amount of disruption caused by the free speech activity in question (distributing "freedom" buttons to Blacks in Southern high schools). In Tinker, the Supreme Court accepted and applied in toto the rationale developed by the Fifth Circuit.

After 1969, lower courts continued to apply the Tinker standard to high school and college cases in which freedom of expression was at issue. Scoville

v. Joliet Township High School District 204[44] at the high school level, and Norton v. Discipline Committee of East Tennessee State University[45] at the college level, serve as examples. In Scoville, several students were expelled for distributing leaflets critical of school policies and school authorities. In reversing the lower court, which had applied the clear and present danger test to determine that the distribution constituted a direct and substantial threat to the effective operation of the high school, the Seventh Circuit noted that the students' conduct had not resulted in any commotion or disruption of classes. Further, the court of appeals demanded a showing of reasonable forecast of a substantial disruption of school activity before school officials might act.

In Norton, the Sixth Circuit ruled that the suspension of college students, after they had distributed literature calculated to cause a disturbance and disruption of school activities, was defensible on grounds that school authorities had correctly applied the clear and present danger test. As demonstrated by the Norton case, the clear and present danger doctrine has not always favored the unfettered expression of free speech by students. However, it has at least provided some reasonable guidelines for applying a societal standard to the school environment.[46]

Another important group of cases in which courts have applied identical standards of law to both community and school settings is that in which the requirements of due process have been invoked as a defense.[47] In the school context, these cases have primarily dealt with situations involving either 1) adequate notice and opportunity for hearing prior to disciplinary action on the part of school authorities, or 2) implementation of adequate procedural safeguards in any school system allowing for prior restraint. While lower

courts have recognized students' due process rights in many instances, the Supreme Court did not explicitly rule on this issue until it decided Goss v. Lopez[48] in 1975. The Court held that because the students had a legitimate claim to a public education, any administrative action which interfered with this right was subject to at least the minimal requirements of due process. The Court also held that in this factual situation, the fourteenth amendment required some form of notice and hearing prior to suspension. The Court followed the Goss precedent recently in upholding the expulsion of a medical student from a public university.[49] The Court ruled that due process had been afforded by the school in giving ample notice of being on probation, administering a competency examination and allowing a hearing in the matter.

The use of the due process clause to temper systems of prior restraint has been underscored by a series of appeals court decisions in the Fourth Circuit.[50] Essentially, that circuit has consistently stated the need for specificity whenever school rules include a system of prior restraint. For example, in Nitzberg v. Parks,[51] the court rejected school officials' fifth attempt to revise school rules permitting administrative review of student publications before distribution. The decision was reached on grounds that the rules were still lacking in procedural specificity. Additionally, the court decided against the newly-worded rules because it found them inconsistent with the Tinker standard in that they failed to adequately describe what constituted "substantial and material interference" with school activities

Before Goss, courts deciding college-level cases had also been invoking the due process requirements to defend student press interests. For instance, a federal district court in Antonelli v. Hammond[52] ruled that a procedure

requiring faculty/administrative review of material before publication, if not accompanied by adequte procedural safeguards, was unconstitutional. Its opinion was based on the conclusion reached by the Supreme Court in Freedman v. Maryland,[53] wherein the concept of adequate procedural safeguards was applied to a similar situation in the community at large.

The right of association has also been recognized by the Supreme Court and by lower courts as applying equally to community and educational situations. Specifically, the Supreme Court in Shelton v. Tucker[54] and Healy v. James[55] declared that this right was retained, respectively, by teachers and students. In Shelton, the issue was one of requiring teachers to list the organizations to which they belonged or regularly contributed. In Healy, the issue concerned a university's right to deny official recognition to a campus group on grounds of ideological differences between the organization's purpose and stated college policy. In both cases, the Court upheld the view that the right of association was not forfeited by virtue of the environment in which it was exercised.

The lower federal courts have generally agreed with this interpretation. For example, in the more recent cases involving university recognition of homosexual groups, the courts in each instance have ruled that such groups may not be treated differently from other campus organizations.[56] At the high school level, the issue of association seems to have arisen only in the Tenth Circuit when school officials failed to continue the teaching contract of a teacher who had served as temporary adviser to an underground newspaper. The court ruled that this was an inadequate basis for denying contract renewal.[57]

Another constitutional concept which the courts have applied equally to community and school environments is that only regulations concerning time,

place and manner of distribution may be used to restrict free speech activities, and conversely that regulation based upon content is not acceptable. In Papish,[58] the leading case in this area, a college student had been expelled not for violation of proper distribution regulations, but rather on the basis of content that offended university administrators. The Court found this impermissible. To date, three circuits have applied this concept at the college level and one circuit has done so at the high school level.[59]

The final area in which both the Supreme Court and the lower courts have applied societal standards to the educational community is that of equal protection under the law. In 1972, the Supreme Court decided two cases dealing with picketing ordinances which conditionally proscribed such activity near school premises.[60] In both cases, the Court ruled that under the equal protection clause, the content of a picket sign may not be used to deny a person's right of expression. Of the few equal protection cases which have been decided by lower courts, most resulted from the imposition of "speaker bans" at the high school and college levels.[61] In the lower courts, as in the Supreme Court, these cases appear to be decided upon grounds of both equal protection and content regulation. The only reported high school case which was decided solely on equal protection grounds involved a student's right to solicit advertisements and donations for an unofficial high school publication.[62] The court held that where denial of a student's activity request to solicit funds for this purpose acts to prohibit publication of a student newspaper, such denial constitutes a violation of equal protection.

In addition to the areas in which courts at all federal levels have applied societal standards to educational communities, there are several areas

in which only the lower courts have acted. In terms of number of cases, the most prominent is the courts' application of vagueness and overbreadth standards to administrative decisions about on-campus picketing,[63] distribution of literature,[64] speaker bans[65] and commercial solicitation.[66]

Another area in which only lower courts have acted concerns the application of libel laws to the student press. Without exception, the courts have viewed student publications as no more or less susceptible to charges of libel than are private publications.[67]

Perhaps the most unsettled area is the equal access/editorial discretion problem. One reason for the discrepancy in holdings may be that this area is just as unsettled in society at large.[68] The question has arisen once at the high school level, three times at the college level and once in a non-school case involving a state-supported publication. At the high school level, a federal district court ruled that student newspapers which serve as public forums cannot refuse to accept political advertising.[69] At the college level, in cases concerning student newspapers, the results have been mixed. In Lee v. Board of Regents,[70] the Seventh Circuit held that a campus paper which accepts commercial advertisements must also accept editorial advertisements. In Mississippi Gay Alliance v. Goudelock,[71] however, the Fifth Circuit ruled that the editor of the campus newspaper may exercise editorial discretion in selecting advertising for the publication. Public forum theory suggests that where school publications serve in that capacity, student editors may exercise editorial discretion only over news and other informational content not of a revenue-producing nature. The decisions in Avins v. Rutgers[72] and Radical Lawyers Caucus v. Pool[73] are consistent with this philosophy. In Avins, the

court held that student editors could reject submissions to a state-supported law journal, while in Radical Lawyers, the holding was that editors of a state-supported law journal could not exercise editorial discretion in choosing advertisements for the publication. Public forum theory suggests that the Mississippi Gay Alliance decision is an anomaly. Additional support for this position is offered by Justice Goldgerg's strong dissenting opinion in that case.[74] He convincingly demonstrates that because there exists a right of access to public forums (such as school newspapers), editorial control may not be extended to advertisements or "announcements" from individuals outside the newspaper staff. These guidelines allow the reconciliation of the right of access and the right to edit.

While several other areas exist in which societal standards have been applied to school settings, the small number of cases involved in each area serves only to demonstrate and confirm that the scope of such application is broadening.[75] However, one area which deserves further discussion is that involving regulation of commercialism on campus.

Three years before the Supreme Court took steps toward giving first amendment protection to commercial speech in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,[76] a federal district court in Nebraska ruled that if commercial speech were allowed on the high school campus at all, regulation must be even-handed.[77] However, in 1977, another federal court in Nebraska considered a similar question and took note of Virginia State Board. The court held that there was no longer a first amendment exception for commercial speech, and that total bans on commercial literature were not now acceptable.[78]

In the last decade, then, the use of a dual legal standard for school and community environments generally has been rejected by the courts. In many jurisdictions students are no longer less protected by state and federal laws than are persons in the community at large. From 1967-77, courts have made positive statements about students' constitutional protection while in school, beginning with Justice Fortas' strong language in Tinker.[79] In Dickey v. Alabama, a federal court said, "A state cannot force a college student to forfeit his constitutionally protected right of freedom of expression as a condition to his attending a state-supported institution."[80] Ten years later in Gay Lib v. University of Missouri, the Eighth Circuit said, "(T)he First Amendment must flourish as much in the academic setting as anywhere else."[81]

The Student Press as Public Forum

Cases illustrating the fall of the double standard include those vindicating editorial discretion only within certain boundaries and those upholding only time, place and manner regulations of free speech activity on campus. These cases indicate that student publications have in themselves been considered public forums. Perhaps this point was made most forcefully by the Zucker court:

> Where a school newspaper is a forum for the dissemination of ideas, i.e., where a school paper appears to have been an open forum to free expression of ideas in the news and editorial columns as well as in letters to the editor, it is patently unfair in light of the free speech doctrine to close to the students the forum which they deem effective to present their views.[82]

As noted, other cases also stress that student newspapers have specifically been viewed as providing forums for the exchange of ideas.[83] One court

recognized a school newspaper as being as much a forum as "a soapbox in a public place."[84]

That student publications are intended to be public forums is given further support through recognition by the courts that "the cases involving student publications are quite similar to, and owe much of their rational to, those cases which have been characterized as 'open forum' cases."[85] Decisions in which this rationale has been applied to student newspapers affirm that once a forum for expression is established, officials are limited in placing restraints upon its use.[86] As the First Circuit has noted regarding a school setting:

> It is well settled that once a forum is open for expression of views, regardless of how unusual the forum, under the mandate of the First Amendment and equal protection clause, neither government nor private censor may pick and choose between those views which may or may not be expressed.[87]

Courts drawing the student publication-public forum analogy usually then apply first amendment guarantees to student newspapers. For example, in the 1977 case, Gambino v. Fairfax County School Board,[88] authorities attempted to prohibit the publication of a sex education article in the high school newspaper. The Fourth Circuit upheld the lower court decision that a school paper, which is established as a public forum, is entitled to first amendment protection. Of course, the principle that the first amendment fully applies to student newspapers was recognized by the Supreme Court when it decided Papish in 1973.

Thus there is a significant amount of available evidence to support the conclusions that, 1) student publications are now considered to be public forums,

and 2) these forums have first amendment protection equal to that of those more traditional public forums, e.g., streets and parks. In the evolutionary process which has culminated in a new meaning for freedom of the student press, the question of whether student expression is basically compatible with normal educational activity has been answered in the affirmative. It is because of this affirmation that courts have been willing to protect student expression and extend the public forum right to student publications.

Conclusions

Since 1939, legal recognition of the public forum concept has been extended from the initial restrictions defined by public streets and parks to much broader boundaries which have come to include the public school. This expansion has rapidly gained momentum in the last decade, as indicated by the number of major Supreme Court decisions in this area. The expansion of the free speech right was accompanied by a movement of similar intensity aimed at narrowing the scope of regulatory action which might inhibit first amendment freedoms.

Ultimately, recognition of the public school as a public forum was coupled with the narrowed scope of allowable regulatory action. The result has been a philosophical revolution in which the student press, once conceived as an educational tool fully controlled by school authorities, is now seen as enjoying the same freedom from regulation afforded any other speech activity in a public forum. While the philosophy has not yet been universally accepted, it has been recognized by all levels of federal courts and by several state courts.

The implication of these developments is that students who edit, produce or distribute literature on school grounds are subject to regulatory action which is consistent with first amendment public forum policy as defined by time, place and manner restrictions. Additionally, publications shown to have caused material and substantial interference with educational processes are not protected. However, censorship based on content alone is no longer seen as being compatible with the functions of the student press.

In light of public forum doctrine, prior restraint may be applied to student publications only when authorities can make a reasonable forecast of material and substantial disruption of normal school activities. This means that those students availing themselves of the right to a free press enjoy the same protection from interference by administrators as is enjoyed by others who exercise their right to free expression in other public forums.

As discussed above, the right of access to a given student publication is limited by the degree to which the publication accepts non-editorial content. When a publication does accept paid advertisements and/or announcements, public forum theory demands equal access for this type of content. Public forum theory recognizes the right of complete editorial discretion on the part of editors and publishers of that part of a publication which is purely editorial in nature.

In sum, the more traditional idea of schools as protected enclaves has been replaced, by judicial directive, with the concept of schools as an integral part of society in which constitutional guarantees must flourish unfettered. The guarantee of freedom of the student press, which has been specifically recognized by the courts, flows directly from public forum theory as applied to the educational environment.

NOTES

[1]307 U.S. 496 (1939).

[2]See Stone, "Fora Americana: Speech in Public Places," 1974 Sup. Ct. Rev. 233 (1974).

[3]Grayned v. City of Rockford, 408 U.S. 104 (1972); Adderley v. Florida, 385 U.S. 39 (1966).

[4]Cox v. New Hampshire, 379 U.S. 536 (1965).

[5]Id.

[6]Brown v. Louisiana, 383 U.S. 131 (1966).

[7]See Adderley v. Florida, 385 U.S. 39 (did not recognize a right to demonstrate in the driveway of a county jail and thus restricted free speech activity in at least one publicly owned area).

[8]Horning, "The First Amendment Right to a Public Forum," 1969 Duke L.J. 931, 946 (1969).

[9]393 U.S. 503 (1969).

[10]Id. at 506.

[11]Id. at 513.

[12]T. Emerson, The System of Freedom of Expression 307 (1970).

[13]See, e.g., Wilson v. Bucknam, 71 Me. 545 (1880).

[14]Montgomery v. Reorganized School District, 339 S.W.2d 831 (Mo. 1960).

[15]Dunkel v. Elkins, 325 F. Supp. 1235 (D. Md. 1971).

[16]393 U.S. at 512-13 n. 6 (quoting Hammond v. South Carolina State College, 272 F. Supp. 947 (D.C.S.C. 1967)).

[17]408 U.S. 169 (1972).

[18]408 U.S. 92 (1972). A similar conclusion was reached in Grayned v. City of Rockford, 408 U.S. 104.

[19]410 U.S. 667 (1973).

[20]Id. at 671.

[21]419 U.S. 565 (1975).

[22]See Nahmod, "Beyond Tinker: The High School as an Educational Public Forum," 5 Harv. C.R.-C.L. L. Rev. 278 (1970). A more recent approach is Garrison, "The Public School as Public Forum," 54 Tex. L. Rev. 90 (1975).

[23]319 U.S. 624, 637 (1943).

[24]354 U.S. 234, 250 (1957).

[25]385 U.S. 589 (1967).

[26]Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir. 1971); Shanley v. Northeast Independent School Dist., 462 F.2d 960 (5th Cir. 1972); Scoville v. Joliet Township High School Dist. 204, 425 F.2d 10 (7th Cir. 1970), cert. denied, 400 U.S. 826 (1970); Hernandez v. Hanson, 430 F. Supp. 1154 (D. Neb. 1977); Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir. 1977).

[27]The Third, Sixth and Eleventh Circuits are the only circuits that have not yet spoken specifically in support of this concept.

[28]Hernandez v. Hanson, 430 F. Supp. 1154; Wilson v. Chancellor, 418 F. Supp. 1358 (D. Ore. 1976).

[29]Bazaar v. Fortune, 489 F.2d 225 (5th Cir. 1973), aff'g en banc with modification, 476 F.2d 570 (5th Cir. 1973), cert. denied, 416 U.S. 995 (1974); Lee v. Board of Regents, 441 F.2d 1257 (7th Cir. 1971; Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971).

[30]Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970); Vail v. Board of Education, 354 F. Supp. 592 (D.N.H. 1973), vacated and remanded, 502 F.2d 1159 (1st Cir. 1973); Gay Students Organization of the University of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969); Panarella v. Birenbaum, 343 N.Y.S.2d 333 (N.Y. App. 1973); Gambino v. Fairfax County School Board, 564 F.2d 157 (4th Cir. 1977); Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976).

[31]Gay Students Organization of the University of New Hampshire v. Bonner, 509 F.2d 652; Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973); Bazaar v. Fortune, 489 F.2d 225; Hatter v. Los Angeles City High School Dist., 452 F.2d 673 (9th Cir. 1971).

[32]410 U.S. at 670.

[33]308 F. Supp. 1329.

[34]Id. at 1336.

[35]Panarella v. Birenbaum, 343 N.Y.S.2d at 338.

[36]Letwin, "After Goss v. Lopez: Student Status as Suspect Classification?" 29 Stan. L. Rev. 627 (1977).

[37]Representative cases are discussed in text with notes 42-81, infra.

[38]The issue has not yet arisen in the Eleventh Circuit, and the only federal case in the Third Circuit was at the Court of Appeals level.

[39]As originally espoused by Justice Holmes in Schenck v. United States, 249 U.S. 47 (1919).

[40]See Timmons, "Clear and Present Danger--Full Circle," 26 Baylor L. Rev. 385 (1974).

[41]See Note, "Prior Restraints in Public High Schools," 82 Yale L.J. 1325 (1973); Nichols, "The Tinker Case and Its Interpretation," 52 Journ. Monographs (1977).

[42]Blackwell v. Issaquena Co. Board of Education, 363 F.2d 749 (5th Cir. 1966).

[43]Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

[44]Scoville v. Joliet Township High School District 204, 425 F.2d 10.

[45]419 F.2d 195 (6th Cir. 1969), cert. denied, 399 U.S. 906 (1970).

[46]See, e.g., Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd, 515 F.2d 504 (2d Cir. 1975); Shanley v. Northeast Independent School Dist., 462 F.2d 960; Fujishima v. Board of Education, 460 F.2d 1355 (7th Cir. 1972); Karp v. Becken, 477 F.2d 171 (9th Cir. 1973).

[47]See, e.g., Riseman v. School Committee, 439 F.2d 148 (1st Cir. 1971); Eisner v. Stamford Board of Education, 440 F.2d 803; Shanley v. Northeast Independent School District, 462 F.2d 960; Jones v. State Board of Education, 407 F.2d 834 (6th Cir. 1969), cert. dismissed, 397 U.S 31 (1970), rehearing denied, 397 U.S. 1018 (1970); Snyder v. Board of Trustees, 286 F. Supp. 927 (N.D. Ill. 1968); Hernandez v. Hanson, 430 F. Supp. 1154; Rowe and Zelter v. Campbell Union High School Dist., Nos. 51060, 51501 (N.D. Calif., Sept. 4, 1970); Bertot v. School Dist. No. 1, 522 F.2d 1171 (10th Cir. 1975).

[48]419 U.S. 565.

[49]Board of Curators v. Horowitz, 46 U.S.L.W. 4179 (March 1, 1978).

[50]See Letwin, 'Administrative Censorship of the Independent Student Press--Demise of the Double Standard?" 28 S. Car. L. Rev. 565 (1977).

[51]525 F.2d 378 (4th Cir. 1975).

[52]308 F. Supp. 1329.

[53]380 U.S. 51 (1965).

[54]364 U.S. 479 (1960).

[55]408 U.S. 169.

[56]Gay Students Organization of the University of New Hampshire v. Bonner, 509 F.2d 652; Gay Alliance of Students v. Matthews, 544 F.2d 162; Gay Lib v. University of Missouri, 558 F.2d 848.

[57]Bertot v. School Dist., 522 F.2d 1171.

[58]410 U.S. 667.

[59]Gay Students Organization of the University of New Hampshire v. Bonner, 509 F.2d 652; Thonen v. Jenkins, 491 F.2d 722 (4th Cir. 1973); Bazaar v. Fortune, 489 F.2d 225; Fujishima v. Board of Education, 460 F.2d 1355.

[60]Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92; Grayned v. City of Rockford, 408 U.S. 104.

[61]E.g., Brooks v. Auburn University, 412 F.2d 1171 (5th Cir. 1969); Wilson v. Chancellor, 418 F. Supp. 1358.

[62]Pliscou v. Holtville Unified School Dist., 411 F. Supp. 842 (S.D. Calif. 1976).

[63]Marin v. University of Puerto Rico, 377 F. Supp. 613 (D.P.R. 1974).

[64]E.g., Riseman v. School Committee of the City of Quincy, 439 F.2d 148; Nitzberg v. Parks, 525 F.2d 378; Leibner v. Sharbaugh, 429 F. Supp. 744 (E.D. Va. 1977).

[65]E.g., Stacy v. Williams, 306 F. Supp. 963 (N.D. Miss. 1969); Brooks v. Auburn University, 412 F.2d 1171.

[66]New Left Education Project v. Board of Regents of the University of Texas System, 326 F. Supp. 158 (W.D. Tex. 1970), dismissed as moot, 472 F.2d 218 (5th Cir. 1973), vacated as moot, 414 U.S. 807 (1975).

[67]E.g., Langford v. Vanderbilt University, 318 S.W.2d 568 (Tenn. 1958); Klahr v. Winterble, 418 P.2d 404 (Ariz. 1966); Trujillo v. Love, 322 F. Supp. 1266; Williams v. Board of Trustees, Southern Illinois University, No. 74-CC-543 (Court of Claims, Ill., May 12, 1975).

[68]Several authors have argued for a right of access to private and public newspapers. See, e.g., Barron, "Access to the Press--A New First Amendment Right," 80 Harv. L. Rev. 1641 (1967); B. Schmidt, Freedom of the Press vs. Public Access (1976). But see, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (right of reply law ruled unconstitutional).

[69]Zucker v. Panitz, 299 F. Supp. 102.

[70]441 F.2d 1257.

[71]536 F.2d 1073 (5th Cir. 1976).

[72]383 F.2d 151 (3rd Cir. 1967), cert. denied, 390 U.S. 920 (1968).

[73]324 F. Supp. 268 (W.D. Tex. 1970).

[74]536 F.2d at 1076.

[75]See, State v. Buchanan, 436 P.2d 729 (Ore. 1968), cert. denied, 392 U.S. 905 (1968) (in construing newsman's privilege); Segall v. Jacobson, 295 F. Supp. 1121 (S.D.N.Y. 1969) (in determining guidelines for pre-trial relief); Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970) (in construing a state flag desecration statute); Stanford Daily v. Zurcher, 353 F. Supp. 124 (N.D. Calif. 1973), cert. granted, 46 U.S.L.W. 3214 (Oct. 3, 1977) (in construing search and seizure guidelines).

[76]425 U.S. 748 (1976).

[77]Peterson v. Board of Education, 370 F. Supp. 1208 (D. Neb. 1973).

[78]Hernandez v. Hanson, 430 F. Supp. 1154.

[79]393 U.S. 503.

[80]273 F. Supp. 613, 618 (M.D. Ala. 1967), dismissed as moot sub. nom., Troy State University v. Dickey, 402 F.2d 515 (5th Cir. 1968).

[81]558 F.2d at 857.

[82]299 F. Supp. at 105.

[83]See text referenced by notes 33-35, supra.

[84]Buckel v. Prentice, 410 F. Supp. 1243, 1246 (D. Ohio 1976).

[85]Bazaar v. Fortune, 476 F.2d at 575.

[86]E.g., Antonelli v. Hammond, 308 F. Supp. 1329; Trujillo v. Love, 322 F. Supp. 1266; Panarella v. Birenbaum, 343 N.Y.S.2d 333.

[87]Bonner-Lyons v. School Committee, 480 F.2d 442, 444 (1st Cir. 1973).

[88]564 F.2d 157.